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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 524

CARTER MOUNTAIN TRANSMISSION CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION

and

JOSEPH P. ERNST and MILDRED V. ERNST
d/b as CHIEF WASHAKIE TV, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

E. STRATFORD SMITH
ROBERT E. CONN
Smith & Pepper
1111 E Street, N. W.
Washington 4, D. C.
Counsel for Petitioner

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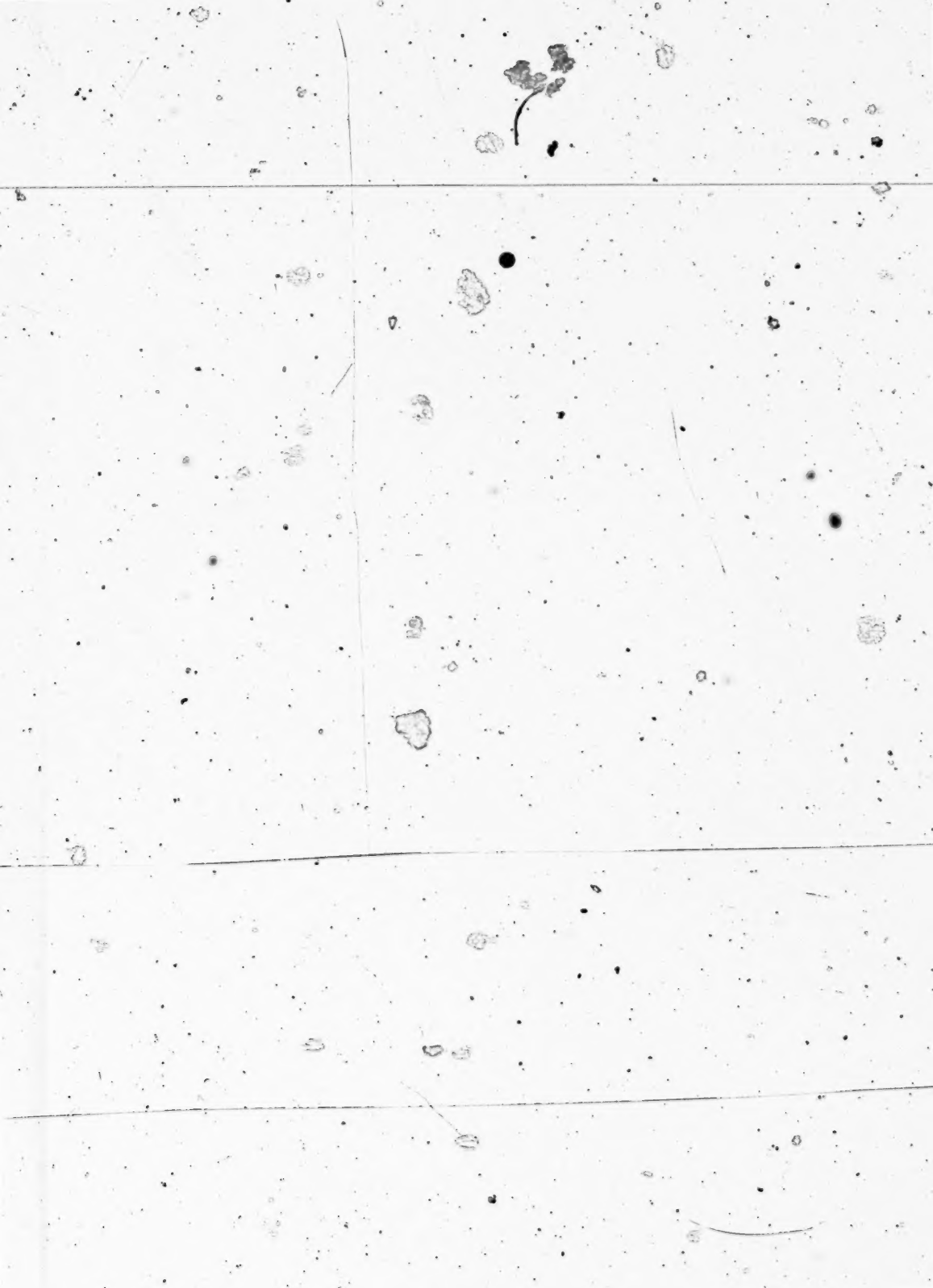

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carter Mountain Transmission Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on May 23, 1963.

CITATIONS TO OPINIONS BELOW

The decisions of the Federal Communications Commission (R. 127, 150 and 167) appear in the Joint Appendix (pp. 127, 150 and 167), as printed for the use of the court below. The Final Decision of the Commission is reported at 32 F.C.C. 459. The opinion of the Circuit Court of Appeals is printed in Appendix A hereto, *infra*, p. A-1. This opinion had not been published in the reporter systems at the date of this petition.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 23, 1963. R. 192; p. A-12, *infra*. A timely petition for rehearing filed on June 7, 1963, was denied on July 9, 1963. R. 226. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's denial of a license to a communications common carrier, solely because of the nature and the lawful use of the intelligence to be transmitted by its customer, constitutes censorship in violation of the First Amendment to the Constitution and of the Communications Act of 1934.

2. Whether the Commission has unlawfully subordinated the public's right to common carrier communications service to broadcasting interests, contrary to the Communications Act.

3. Whether Congress, by considering and failing to overturn contemporaneous Commission decisions, acquiesced in and approved of their holding (contrary to

the instant case) that the public cannot, under the Communications Act, validly be denied common carrier service in order to protect broadcasting interests.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution along with the following sections of the Communications Act of 1934, as amended, are set forth in Appendix B hereto: Sections 1, 201(a), 214(a) (c) and (d), 307(b), 308(a), 309(a) (b) and (c), and 326 (47 U.S.C. §§ 151, 201(a), 214(a) (c) and (d), 307(b), 308(a) (b) and (c) and 326). Appendix B also contains Section 1 (18-22) of the Interstate Commerce Act (49 U.S.C. § 1 (18-22).

STATEMENT OF THE CASE

Petitioner is a communications common carrier which renders service within the State of Wyoming by means of radio microwave facilities pursuant to authority granted by the Federal Communications Commission under the Communications Act of 1934. Petitioner's service consists of the transmission of television signals to reception points specified by its customers from points at which the signals are picked up off of the air by means of antennas of petitioner's customers. This identical type of service is rendered by the American Telephone and Telegraph Company, smaller telephone companies, and specialized carriers similar to petitioner.

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[1] Petitioner reserves the right to argue that the Commission's conclusion that the rendition of the common carrier service, at issue, would result in the demise of a television broadcasting station, is not supported by adequate findings and substantial evidence.

Television program transmission service by common carriers represents one form of private line communications service.[2] Both A.T. & T. and The Western Union Telegraph Company provide many other forms of private line service between specified locations of a given customer. These forms of service include telephone, teletypewriter, telephotograph (facsimile), and data services, and are provided to businesses, including newspapers which are large users of teletypewriter and telephotograph services.[3] The same type of electromagnetic circuit is used to provide all of these private line services. However, the required width of the channel increases as the use progresses from the written word through the spoken word up to communications in picture form.[4]

A.T. & T. provides the bulk of the television transmission service throughout the Nation by means of a combination of its microwave radio facilities and its coaxial cable system. Most of the subscribers to this service are broadcasting stations which receive network-originated programs by this means. Many of the broadcasting stations are located along A.T. & T.'s cross-country coaxial cable and microwave systems. Stations not so situated might be served by means of a microwave system especially provided by A.T. & T. and connecting to the cross-country system. Remotely

[2] *CATV and TV Repeater Services*, 26 F.C.C. 403, 433 (1959); pertinent excerpts from this case are quoted in Appendix C, hereto, at page A-21.

[3] *A.T.&T. and Western Union Private Line Cases*, 34 F.C.C. 217, 250, 368 (1963); *Press Private Line Case*, 28 Fed. Reg. 9887 (Sept. 11, 1963).

[4] *American Telephone & Telegraph Co.* (Telpak), 30 F.C.C. 625 (1961).

located broadcasting stations, which do not find such direct connections economically feasible, might intercept a distant station's signal off of the air and utilize a microwave service (such as that provided by petitioner or by A.T. & T.) to transmit the signal to its station facilities for re-broadcasting purposes.

This type of microwave service would also be available, but economically unfeasible, to individuals whose television reception is unsatisfactory due to disadvantageous geographical locations. Community antenna television systems have been operated in order to provide an economically feasible means of television reception for individuals who cannot obtain satisfactory service by means of the usual antenna arrangements within or on top of the television sets or on rooftops. Community or master antennas are usually constructed at geographical elevations favorable to television reception, and the video signals, so obtained, are transmitted on cable to individual television sets within a given community. As the distance between the master antenna and the community increases, the antenna operator often finds it desirable to utilize the service of a communications common carrier to transmit the signal from the antenna to the community. The signal is then carried on the wire facilities of the antenna operator to the individual television receiving sets.[5]

Private line service is rendered either by means of wire or microwave radio facilities, or a combination of both.[6] If the common carrier provides the service

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[5] *CATV and TV Repeater Services, supra*, at pp. 407-409.

[6] *A.T.&T. and Western Union Private Line Cases, supra*, at pp. 255, 256, and 288 n. 17.

by means of wire facilities and no state boundaries are crossed, no federal operating authority is required. However, if the carrier operates by means of microwave radio, as does petitioner, or if the wire facilities form an interstate circuit, authority must be obtained from the Federal Communications Commission.

Petitioner serves both a television broadcasting station and several community antenna systems under existing federal authority. On April 28, 1958, petitioner filed an application with the Commission for authority to expand its common carrier service to its existing community antenna customer, Western Television Corporation. Petitioner sought authority to use available radio frequencies assigned to the common carrier service. The application was granted on April 22, 1959, but the grant was stayed by Commission order of June 29, 1959, following a protest by the respondent television broadcasting station, Chief Washakie TV. A hearing was held and the Hearing Examiner proposed to grant the application in his Initial Decision of May 25, 1961. (R. 127). The Commission, by its Final Decision of February 16, 1962, reversed its Hearing Examiner and denied the application solely because the proposed service allegedly would enable petitioner's customer to compete more effectively with the responder+ television station (R. 150). As a result, the customer was denied common carrier service; and the common carrier radio frequencies requested by petitioner remained unused. In denying petitioner's application, the Commission was forced to overrule all of its prior precedent.

Petitioner appealed from the Commission's denial of its application to the United States Court of Appeals for the District of Columbia Circuit under Sec-

tion 402(b), (1) of the Communications Act, 47 U.S.C. § 402 (b) (1). The court affirmed the Commission's action and held that television broadcasting interests were the dominant consideration in determining whether a communications carrier should be authorized to honor a request for its services.

REASONS FOR GRANTING THE WRIT

The questions presented raise issues of fundamental importance to all users of common carrier communications services. This telecommunications industry is becoming indispensable in the dissemination of intelligence. Modern society thrives upon, indeed demands, rapidity of movement. Almost all conceivable facets of intelligence are communicated by rapid means. The electromagnetic circuit, the modern vehicle for the carriage of intelligence, forms the vital link between stock exchange and broker, radar outpost and military nerve center, teacher and remote student, and one home and another. In modern society, the electromagnetic circuit has replaced the pamphlet, the soapbox, and the public square as the market place of ideas.

There should be little wonder why the telecommunications industry has been subject, as a form of public utility service, to governmental regulation in order to insure adequate and indiscriminate service at reasonable charges to the public. There has been federal regulation of telecommunications by telephone and telegraph since 1910, originally by the Interstate Commerce Commission, and since 1934 by the Federal Communications Commission. However, not until the instant case has the federal administrative agency, charged with protecting the right of the public to

telecommunications service, denied such service to one proposing to use it in a lawful endeavor.[7]

There is even a more basic and fundamental protection, over and above the usual rights of users of public utility service, available to those choosing to communicate by means of the services and facilities of the communications carriers. This protection is offered under the guarantees of freedom of speech and press contained in the First Amendment.

I.

The Court Below Has Decided Important Questions of Constitutional and Federal Law Which Have Not Been, But Should Be, Resolved by This Court

Communications carriers, including petitioner, are under a statutory "duty" to furnish "communication service upon reasonable request." 47 U.S.C. 201(a). The "public has the legal right to demand" their services.[8] Although this right specifically emanates from the Communications Act, it is consistent with the freedoms of speech and press guaranteed by the First Amendment. Nevertheless, the court below held that this right of the public to service, together with the corresponding duty of the carrier to provide it, was subservient to broadcasting interests. Petitioner's proposed service allegedly would improve its customer's competitive position with respect to a tele-

[7] This Court has faced the issue of attempted denial to the public of telecommunications service by a private agency, *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), but never by the federal agency whose function is to protect the right of the public to such service.

[8] *Pulitzer Publishing Co. v. Federal Communications Commission*, 94 F. 2d 249, 251 (D.C. Cir. 1937).

vision station and thus, according to the court below, would jeopardize the survival of the station.[9]

Under the court's holding, the broadcasting industry has been accorded a preferential position over all other industries in our economy. Broadcasting interests can form the basis for a denial of common carrier communications service to the public. There are many other industries, in addition to community antennas, which might be said to compete with television stations. The press competes with television for advertising and for the attention of the public. The press is making progressively greater use of rapid communications services, including telephotograph, remote typesetting and teletypewriter transmissions.[10] Under the principle of the decision below, the rights of the press to such services are contingent upon the Commission's evaluation of the economic effects upon television stations resulting from any enhancement of the press' competitive position due to its use of rapid communications services.

In disposing of the constitutional questions of freedom of speech and press, the court held that an ap-

[9] Petitioner reserves the right to argue that the record before the Commission does not warrant any conclusion that the survival of the station would be jeopardized or its demise made imminent by the rendition of petitioner's proposed service to its customer. The court below predicated its erroneous conclusion in this regard, in part, upon a misunderstanding of the record. After petitioner explained this misunderstanding to the court (R. 197), it amended its opinion (R. 225) by deleting a factual recitation which was contrary to the record, but substantially in support of the erroneous conclusion regarding the jeopardy to the television station. Nevertheless, the court maintained this erroneous conclusion in its opinion without any explanation of its validity in view of the corrected factual situation.

[10] See authorities cited in footnote 3, *supra*.

plicant for a communications common carrier license has no constitutional right to a grant thereof, and that an applicant cannot invoke the rights of a would-be user of the service because they are contingent upon a grant of the application. This circuitous reasoning renders nugatory the rights guaranteed by the First Amendment when the communications medium is a common carrier.

The Commission did not deny the application because of any deficiency on the part of petitioner's proposal. Petitioner merely proposed what it had been certificated to do: transmit lawful communications of the public for hire upon request. The Commission denied the application because of the nature of the intelligence to be transmitted by petitioner's customer and the manner in which the customer might utilize the intelligence. The Commission indicated that it might reconsider and grant the application if petitioner showed that its customer, the antenna operator, would conduct its business in a manner consistent with the television station's interest. Thus, petitioner would be authorized to carry the identical intelligence it now proposes to carry if its customer would agree to use that intelligence in the manner specified by the Commission.

However, Congress has not delegated any authority to the Commission to license the antenna operator or to regulate its activities. As explained hereinafter, the Commission unsuccessfully sought an enlargement of its authority by Congress in order to impose directly the same restrictions on the operations of community antennas that would be imposed indirectly through a conditional grant of petitioner's application. When the Commission seeks to accomplish an objective be-

yond its statutory authority by preventing the dissemination of intelligence, its ultra vires actions "may be considered as a form of censorship and to that extent they would be in violation of the First Amendment." *American Broadcasting Co.* v. *United States*, 110 F. Supp. 374 (1953), *affirmed* 347 U.S. 284 (1954).

The rights under the First Amendment of users of common carrier communications services could never effectively be enforced if the carrier's operating authority is denied because of the nature and proposed use of the communications desired to be transmitted by the non-jurisdictional customer, whose rights are made contingent upon a grant of the operating authority to the carrier. Under the principle of the decision below, the Commission could examine and censor the proposed communications to be transmitted by a carrier for any person not otherwise subject to the agency's authority if that person's non-jurisdictional conduct was found to be economically detrimental to a broadcasting station.

The fallacy in the reasoning of the opinion below, appears from the court's misplaced reliance upon this Court's decision in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216-17 (1943). *NBC* held that the constitutional right of free speech was not abridged by Commission regulations designed to refuse licenses to broadcasters engaged in objectionable practices. Such practices were deemed to be inconsistent with the obligations of the broadcasters as relating to the interests of the broadcasting audience. However, a broadcasting station is not a public utility, as is petitioner, and the public's right to enjoy the programming of a particular station is circumscribed by the station's obligations to the public interest in broad-

casting.[11] The public has no right, constitutional or statutory, of access to a broadcasting station's microphone or television camera.[12] On the other hand, the public has the legal right to demand common carrier communications service.[13] Accordingly, *NBC* is not apposite to the question of the public's right under the First Amendment to common carrier communications services.

The rights of freedom of speech and freedom of press embrace not only the publication of intelligence, but also its dissemination and distribution, as well as its reception.[14] If the flow of intelligence is dammed at any point by prior governmental restraint, a constitutional question is presented. The Commission's restraint in this case was imposed upon the carrier, an indispensable link in the communications stream. The guarantees of the First Amendment protect all modern modes of communications.[15] These guarantees protect not only the dissemination of ideas and doctrines, but also entertainment and other matters disseminated under commercial auspices.[16]

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[11] *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

[12] *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597 (3d Cir. 1945).

[13] 47 U.S.C. 201 (a). See also *Pulitzer* case, cited in footnote 8.

[14] *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963); *Martin* v. *Struthers*, 319 U.S. 141 (1943); and *Lovell* v. *Griffin*, 303 U.S. 444 (1938).

[15] *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502 (1952); *Saia* v. *New York*, 334 U.S. 558 (1948); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

[16] *Smith* v. *California*, 361 U.S. 147, 150 (1959); *Breard* v. *Alexandria*, 341 U.S. 622, 642 (1951); *Winters* v. *New York*, 333 U.S. 507, 510 (1948).

It is just as much a violation of the First Amendment to deny the right of the pamphlet distributor to go upon the streets of a community, as it is to refuse to license a communications common carrier to transmit lawful communications for a customer engaged in a lawful pursuit. Telephone, telegraph and other common carrier communications services are indispensable in our modern society in communicating intelligence. Congress has not delegated authority to the Commission to censor the content of intelligence transmitted by means of a common carrier, nor to deny its service to one requesting it for lawful purposes.[17] Nor could Congress have constitutionaliy delegated such authority.

The public has both a constitutional and statutory right to disseminate intelligence by means of communciations common carriers. It does not matter whether such dissemination takes the form of television signals or the printed or spoken word. That one form of communication may be more competitively disadvantageous to a television station than another form of communication is of no import.

The fundamental questions presented herein warrant examination and resolution by this Court.

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[17] The Communications Act expressly forbids the Commission from exercising "the power of censorship over the radio communications or signals transmitted by any radio station." 47 U.S.C. § 326. A "radio station" as defined in the Act, includes a common carrier radio transmission facility as well as a broadcasting station. 47 U.S.C. § 153 (b), (d) and (k).

II.

The Decision Below Is in Conflict With a Consistent Line of Judicial and Administrative Authority, and With the Legislative History of the Communications Act

The erroneous holding below, that the right of public access to telephone, telegraph and other common carrier communications services was curtailed through the combination of broadcasting with common carrier regulation under the Communications Act, represents a departure from precedent and prejudices the rights of users of telecommunications services.

The decision below conflicts in principle with decisions of this Court holding that communications carriers are to be regulated "in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission." *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940). The Communications Act of 1934 was a codification of several statutes, and transferred certain authority from several agencies to the Communications Commission. The Mann-Elkins Act of 1910 (36 Stat. 539) extended the general regulatory jurisdiction of the Interstate Commerce Commission to all telegraph, telephone, and cable lines, whether wire or wireless, used in transmitting messages in interstate or foreign commerce. In fact, this was the first statute relating to radio.[18] Broadcasting regulation came later. The pertinent common carrier licensing provisions in the Communications Act, 47 U.S.C. § 214 (a) (c) and (d), cited and construed by the court below, were derived from Section 1 (18-22) of the Interstate Commerce

[18] *Administrative Procedure in Government Agencies, Monograph Of The Attorney-General's Committee on Administrative Procedure*, S. Doc. No. 186, 76th Cong., Part 3, pp. 81-84.

Act.[19] All of the Commerce Commission's reported decisions, which have been found, decided under the latter-mentioned statutory provisions, support the proposition that a person engaged in a lawful endeavor has a legal right to obtain common carrier service, notwithstanding any resulting adverse economic effect upon his competitors.[20]

The legislative history of the Communications Act discloses an explicit congressional intent to embody therein the case precedent developed under the Commerce Act. According to the relevant congressional reports:

> "In this Bill [Communications Act of 1934] the attempt has been made to preserve the value of court and Commission interpretation of that Act [Interstate Commerce Act], but at the same time modifying the provisions so as to provide adequately for the regulation of communications common carriers." [21]

> "In this Bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communica-

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[19] 49 U.S.C. § 1 (18-22). S. Rept. 781, 73d Cong., 2d Sess.; H. Rept. 1850, 73d Cong., 2d Sess.

[20] *Ozark and P.V.R. Co. Construction*, 166 I.C.C. 441 (1930); *Seaboard A.L. Ry. Co. Receivers Resumption of Operation*, 236 I.C.C. 109 (1939); *Kansas City, M. & O. Ry. Co. of Texas Construction*, 295 I.C.C. 51 (1955).

[21] H. Rept. 1850, 73d Cong., p. 4.

tions rather than as a manifestation of Congressional attempt to obtain a different objective."[22]

The court below patently contravened congressional intent in holding that the Commission was not:

> "required to adopt the rationale of the cited decisions of the Interstate Commerce Commission. These decisions are of little relevance here. Questions of competitive injury in the transportation field are very different from questions of public injury in the field of communications."

Indeed, the Communications Commission has recently relied upon cases of competitive injury in the transportation field in a communications carrier case involving questions of public injury.[23] The court's holding that Commerce Commission case precedent is "of little relevance" to a communications common carrier case is novel and revolutionary, conducive to confusion in the communications carrier regulatory field, contrary to the legislative history of the Communications Act, and in direct conflict with prior holdings of this Court.

Separate and distinct principles of regulatory law apply to the broadcasting and telecommunications industries even though they are regulated under the same statute by a single agency. *United States* v. *R.C.A.*, 358 U.S. 334, 348-9 (1959). The public has the legal right of access to the services of a communications carrier but not those of a broadcasting station. This

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[22] S. Rept. 781, 73d Cong., p. 2.

[23] In *A.T.&T.* (*Telpak*), 32 F.C.C. 344 (1961), the Commission relied upon *Eastern Central Motor Carriers Assn.* v. *U.S.*, 321 U.S. 194 (1944); and *Coal to New York Harbor Area*, 311 I.C.C. 355 (1960).

has been consistently and uniformly recognized by the courts prior to the decision below.[24]

The state of the art in modern communications has advanced to the point that the transmission of telegraph, voice, television, facsimile, and data signals may be performed interchangeably or simultaneously by the carrier by means of the same facility, be it wire, radio, or a combination of the two. Accordingly, it would be impractical, if not impossible, to apply different regulatory standards to applications for authority to construct a facility depending upon the type of signal to be transmitted. The transmission of television signals by common carriers cannot be singled out for different regulatory treatment. The denial of the traditional right of access to common carrier communications services for the transmission of one type of signal means the denial of the right for the transmission of all. The importance of this case is obvious because the holding of the court below is applicable to all communications common carrier licensing cases involving the transmission of all types of signals by wire as well as radio facilities.

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[24] *McIntire* v. *William Penn Broadcasting Co*; *supra*, at p. 601:

"[A] radio broadcasting station is not a public utility in the sense it must permit broadcasting by whoever comes to its microphones."

Pulitzer Publishing Co. v. *Federal Communications Commission*, *supra*, at p. 251:

"[A] radio broadcasting station is [not] a public utility in the sense that a railroad is a public utility. Generally speaking, that term comprehends any facility employed in rendering quasi public service such as waterworks, gas works, railroads, telephones, telegraphs, etc. The use and enjoyment of such facilities the public has the legal right to demand; but its right to the use and enjoyment of a privately owned radio station is of a much more limited character."

In holding that the Commission's broadcast responsibilities were paramount over its common carrier obligations, the court below misplaced its reliance upon a provision in Section 1 of the Communications Act (47 U.S.C. § 151) which, to the contrary, supports the traditional right of access to common carrier services. The cited provision indicates that it was Congress' purpose in enacting the statute "to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges." The only services under the Communications Act which must be rendered at "reasonable charges" are those provided by common carriers. Moreover, the terms "adequate facilities" appear again in the Act only in reference to common carrier services. 47 U.S.C. § 214(d). There is nothing in the Communications Act supporting the holding below that the public's right to common carrier services was diminished in 1934 by the enactment of this statute.[25]

The Commission has heretofore consistently held that it cannot validly deny a common carrier authorization in order to reach a community antenna custo-

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[25] The holding below was erroneously premised, in part, upon Section 307(b) of the Communications Act (47 U.S.C. § 307(b)), requiring an equitable distribution of radio service among the several states and communities. Section 307(b) relates to applications for *broadcasting* licenses and is not relevant to common carrier licensing, as is evident from the legislative history of this section (S. Rept. 1588, 74th Cong. pp. 2, 3; H. Rept. 2589, 74th Cong. p. 3), as well as from *Easton Publishing Co.* v. *F.C.C.*, 175 F. 2d 344 (D.C. Cir. 1949), decided in reliance upon *Sanders Bros., supra.*

mer of the carrier, and thus prevent an indirect economic impact upon a broadcasting station.[26] Pertinent portions of the Commission's 1959 decision in this respect are set forth in Appendix C hereto. The Commission transmitted a copy of this decision to Congress and requested enlargement of its jurisdiction enabling it to protect broadcasting stations from community antenna competition by prohibiting the antenna operators from receiving the signals of a distant station which duplicate the local station's programs and requiring the operators to make the programs of the local station available on their systems. Congress refused to enlarge the Commission's jurisdiction.

The court below overlooked Congress' acquiescence in the Commission's prior decisions holding contrary to its decision in the instant case. In deciding questions of the statutory authority of administrative and executive agencies, courts traditionally accord great weight to congressional actions relating to, and contemporary with, decisions and legislative proposals of the agencies. This Court has invalidated Commission actions, as beyond its statutory authority, when the agency theretofore unsuccessfully sought authority from Congress to accomplish the same objective. *F.C.C.* v. *American Broadcasting Co.*, 347 U.S. 284 (1954). See also *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956).

The conclusion is inescapable that Congress has acquiesced in, and approved of, the Commission's

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[26] *CATV and TV Repeater Services*, 26 F.C.C. 403 (1959); *Intermountain Microwave*, 24 F.C.C. 54 (1958). See also, *Frontier Broadcasting Co.*, 24 F.C.C. 251 (1958).

decisions holding that no authority has been delegated to it to regulate community antennas, either directly or indirectly through denial of licenses to common carriers proposing to serve the antenna systems. Accordingly, it is evident that the court not only ignored the legislative history of the Communications Act compiled prior to its enactment in 1934, but also overlooked contemporaneous congressional acquiescence in the Commission's disclaimer of the very authority that it has asserted in this case. The Commission's jurisdiction over common carriers is not reasonably designed for regulation of the private business of the carriers' customers. This position is *a fortiorari* in view of the Commission's unsuccessful attempt to have its jurisdiction extended to reach the community antenna industry, of which petitioner's customer is a part.

CONCLUSION

Broadcasting interests are not paramount to the public's constitutional and statutory right to common carrier communications service. If broadcasting interests require protection, the lawful procedure is congressional action, if warranted, extending the Commission's authority to reach persons deemed to be in competition with broadcasting stations. Neither administrative fiat nor judicial legislation can validly enable the Federal Communications Commission to reach such persons by trodding upon their constitutional and statutory rights. "The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government." *Jones* v. *Securities Commission*,

298 U.S. 1, 27 (1936). For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

E. STRATFORD SMITH
ROBERT E. CONN
Smith & Pepper
1111 E Street, N. W.
Washington 4, D. C.
Counsel for Petitioner

October 7, 1963.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,089

CARTER MOUNTAIN TRANSMISSION CORPORATION, APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE.

JOSEPH P. ERNST AND MILDRED V. ERNST
d/b/as Chief Washakie TV, INTERVENOR.

On Appeal from an Order of the
Federal Communications Commission

Decided May 23, 1963

Mr. E. Stratford Smith, with whom *Mr. Robert E. Cone* was on the brief, for appellant. *Mr. Thomas G. Shack* also entered an appearance for appellant.

Mr. Daniel R. Ohlbaum, Associate General Counsel, Federal Communications Commission, with whom *Mr. Max D. Paglin*, General Counsel, and *Mrs. Ruth V. Reel*, Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.*, was on the brief, for intervenor.

Mr. Robert D. L'Heureux filed a brief on behalf of National Community Television Association, Inc., as *amicus curiae*, urging reversal.

Mr. Robert V. Cahill filed a brief on behalf of National Association of Broadcasters, as *amicus curiae*, urging affirmance.

Before BAZELON, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges:

WASHINGTON, *Circuit Judge:* This is a telecommunications case, in which a challenge is made to the power of the Federal Communications Commission to refuse to grant to a common carrier by radio of facilities to be used by community antenna systems,[1] because of the impact of the proposed grant upon an existing television station.

Carter Mountain Transmission Corporation, appellant here, is a common carrier by radio. It filed an application with the Commission for permission to construct a microwave radio communication system to transmit signals—received from television stations located in several distant cities—to community antenna systems established in the towns of Riverton, Lander, and Thermopolis, Wyoming, by Western Television Corporation. A protest was filed by the licensee of television station KWRB-TV, in Riverton, Wyoming, now an intervenor in this appeal. The Commission caused a hearing to be held, after which the

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[1] Community antenna systems (CATV) "amplify and distribute television signals of good quality to areas where reception is non-existent or difficult. Reception is bolstered in weak signal areas by the installation of a common antenna for the whole area at a favorable location, such as a high hill or a mountain. The antenna picks up a steady signal from a distant television broadcast station, and transmits it by wire to the cable of the community receiving service. Individual television sets of subscribers are connected to the cable, and relay amplifiers are located throughout the system so that each home receives an equally clear signal regardless of location." Clarksburg Publishing Co. v. Federal Communications Commision, 96 U.S. App. D.C. 211, 217 n. 16, 225 F. 2d 511, 517 n. 16 (1955). See also Lilly v. United States, 238 F. 2d 584, 586 (4th Cir. 1956).

Examiner recommended denial of the protest. The Commission reversed, granted intervenor's protest, and denied appellant's application. This appealed followed.[2]

The Commission concluded that it would not serve the public interest, convenience, and necessity to grant appellant's application. Its reasoning was essentially this: that to permit appellant to bring in outside programs for the community antenna system on the basis proposed would result in the "demise" of the local television station (intervenor KWRB-TV) and the loss of service to a substantial rural population not served by the community antenna systems, and to many other persons who did not choose (or were unable) to pay the cost of subscribing to the community antenna systems; and that the need for the local outlet outweighed the improved service which appellant's proposed new facilities would bring to those who subscribed to the community antenna systems. The Commission, however, expressly gave appellant leave to refile its application when it could show that the community antenna systems would carry the signal of the local outlet (intervenor) and would not duplicate its programming.

The parties have agreed on six questions for our consideration. We will take them up seriatim, stating the questions as presented to us.

> "1. Whether the Commission's denial of Appellant's application is based upon an erroneous application of principles of radio broadcast law to a case of common carrier licensing."

Appellant's argument on this point is in essence that the Commission was required to apply classic common carrier criteria in considering its application, and that under these criteria the Commission would have been obliged to grant

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[2] Under Section 402(b)(1) of the Communications Act of 1934, as amended, 66 STAT. 718 (1952), 47 U.S.C. § 402(b)(1) (1958).

a certificate of convenience and necessity authorizing construction of the requested common carrier facilities. The statement is made that under the Communications Act common carriers are regulated "in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission,"[3] and a number of decisions of the Interstate Commerce Commission are cited for the proposition that the latter Commission will not deny a permit for construction and operation of common carrier facilities in the field of transportation because of economic impact upon the competitors of the carrier's proposed customer.[4]

We do not think the Communications Commission applied incorrect legal principles in reaching its decision, or that it was required to adopt the rationale of the cited decisions of the Interstate Commerce Commission. Those decisions are of little relevance here. Questions of competitive injury in the transportation field are very different from questions of public injury in the field of communications.[5] Here the Federal Communications Commission is charged with the duty of regulating not only common carriers by radio but broadcasters of television programs. It cannot let its decisions in the radio carrier field interfere with its responsibilities in the television broadcasting field. In both fields, it must "make avail-

[3] Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470 at 474 (1940); *cf.* Mackay Radio & Tel. Co. v. Federal Communications Commission, 68 App. D.C. 336 at 338, 97 F. 2d 641 at 643 (1938).

[4] Ozark and P.V.R. Co. Construction, 166 I.C.C. 441 (1930); Seaboard A.L. Ry. Co. Receivers Resumption of Operation, 236 I.C.C. 109 (1939); Kansas City, M. & O. Ry. Co. of Texas Construction, 295 I.C.C. 51 (1955).

[5] We note that, even so, the Interstate Commerce Commission is obliged to give weight to "considerations of national policy with respect to the transportation system." Interstate Commerce Commission v. Railway Labor Executives Association, 315 U.S. 373, 377 (1942).

able, so far as possible, to all the people of the United States," adequate and efficient service. See Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151 (1958). A common carrier by radio cannot construct a new facility or extend its existing facilities *sua sponte*: it must first obtain a certificate or license from the Commission, authorizing it to establish such facilities, and before awarding the authority the Commission must be convinced that the proposal is "reasonably required in the interest of public convenience and necessity." See 47 U.S.C. § 214(a)(c) and (d) (1958). The interest of the listening and viewing public in better and more effective service is paramount. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943); *Federal Radio Commission v. Nelson Brothers Co.*, 289 U.S. 266, 285 (1933). And in the common carrier field, as well as in the broadcasting field, "competition is a relevant factor in weighing the public interest." *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953); cf. *Mansfield Journal Co. v. Federal Communications Commission*, 86 U.S.App.D.C. 102, 180 F.2d 28 (1950).

Relevant, too, is the congressional mandate that the Commission "make such distribution of licenses, frequencies, . . . and of power among the several States and communities as to provide a fair, efficient and equitable distribution of . . . service to each of the same." Section 307(b) of the Communications Act, 47 U.S.C. § 307(b) (1958). It is axiomatic that in carrying out its obligations under Section 307(b), as in considering the comparative qualifications of applicants for the same frequency or channel, the Commission may weigh the net effect on the community or communities to be served. See *Pinellas Broadcasting Co. v. Federal Communications Commission*, 97 U.S. App.D.C. 236, 230 F.2d 204, cert. denied, 350 U.S. 1007 (1956); cf. *Federal Communications Commission v. Allentown Broadcasting Co.*, 349 U.S. 358 (1955). It neces-

sarily follows that in determining whether the authorization requested by appellant would be in the public interest the Commission was entitled — if indeed it was not obliged — to consider the use to which the facilities and frequencies requested were to be put, and to weigh that use as against other legally relevant factors, including the effect on existing local stations. Cf. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961).[6]

> "2. Whether the Commission's denial is an arbitrary and capricious denial of access to common carrier communications facilities to which Appellant's proposed customer is entitled as a matter of law."

This question must be answered in the negative. There is no basis for the view that appellant's proposed customer is entitled to access to appellant's proposed facilities as a matter of law. Congress has made its "right" to access depend on whether the appellant obtains a license from the Federal Communications Commission under the standard of public convenience and necessity. The Commission's action in this case is not in our opinion arbitrary and capricious, for the reasons set out above, and for additional reasons to be stated later.

> "3. Whether the Commission's denial for the reasons indicated constitutes an extension of its

[6] In the *Transcontinental* case, the Federal Power Commission denied an application for the transportation of natural gas because the proposed end use — burning the gas under industrial boilers — was deemed inferior to other possible uses. The Supreme Court approved the denial, saying that the Federal Power Commission is authorized to consider end uses in determining "public convenience and necessity." 365 U.S. at 7. By parity of reasoning, the Federal Communications Commission, in determining the issue now presented, can consider the "end use" or "end result" of the application made to it by appellant.

authority beyond its statutory jurisdiction to regulate community antenna systems."

Appellant points out that the Commission has no direct jurisdiction or authority over community antenna systems, and in fact has asked Congress—so far unsuccessfully—for such authority. It argues that the Commission has nevertheless attempted to regulate Western, the community antenna proprietor, without legal authority, when it included in the order denying appellant's application the words "without prejudice to refiling when a showing can be made that the duplication of programming is adequately avoided and a satisfactory arrangement is arrived at by which the cable system will carry the local KWRB TV service."

We cannot agree that this amounts to an attempt to regulate Western's antenna system, even though it may have an indirect effect on that system. The Commission was considering appellant's application in its relevant setting, and the clause quoted moderated its denial of the application by granting appellant the opportunity to show that the threatened damage to the local station would not in fact occur, i.e., that Western will not duplicate the latter's programs and will transmit the latter's signal to Western's subscribers. To be sure, appellant would have to secure the cooperation of Western to make such a showing, but in the circumstances this does not appear to us an unreasonable condition for the granting of appellant's application to construct facilities from which Western would presumably benefit. The Commission deemed adequate protection of the local station to be in the public interest, and instead of denying appellant's application outright, as it might have done, it offered the appellant the opportunity to secure what it was seeking if it protected the public interest.

"4. Whether the Commission's denial constitutes unlawful or unconstitutional censorship of public communications."

Appellant urges that the First Amendment guarantees to Western the use of all possible means of public communication, free of any restraint or denial based on the competitive impact of the materials transmitted. Appellant also relies on the prohibition against censorship contained in Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326 (1958).

We do not consider that the Commission has violated either the constitutional or the statutory mandate. We do not have Western before us. Whatever the latter's rights generally may be, the appellant—and only the appellant—is seeking a license which the Commission, applying proper principles under the law, has denied. We cannot hold that appellant is entitled to the authorization sought, in derogation of those principles, merely because one of its customers claims to have rights of communication not available to the appellant.

It may be assumed that any denial of a license to transmit radio or television programs keeps off the air, and hence deprives the public of, the material which the applicant desires to communicate. But that does not mean that the Commission must grant every license which is requested. Nor does it mean that the whole statutory system of regulation is invalid. Quite the contrary is true: a denial of a station license, validly made because the standard of "public interest, convenience, or necessity" has not been met, is not a denial of free speech. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-27 (1943).

The Commission's offer to reconsider appellant's application if it shows that Western will not duplicate the local station's programs, and will make those programs available to Western's subscribers, appears to us to be a legitimate measure of protection for the local station and the public interest. The protection of the public interest does not amount to "censorship" within the meaning of Section

326. See *Bay State Beacon v. Federal Communications Commission*, 84 U.S.App.D.C. 216, 171 F.2d 826 (1948). See also *KFKB Broadcasting Ass'n v. Federal Radio Commission*, 60 App.D.C. 79, 47 F.2d 670 (1931).

> "5. Whether the Commission made adequate findings explaining why the denial of a common carrier authorization under the circumstances of the instant case is a legally valid exercise of regulatory jurisdiction and not censorship of public communications, particularly in view of the Commission's contrary holdings in this regard."

Appellant's argument on this point is that prior to its decision in the instant case, "the Commission consistently has held that it cannot validly deny a common carrier authorization in order to reach a community antenna customer of the carrier and thus prevent an indirect economic impact upon a broadcast station." Appellant says that this policy should not be abandoned "except for the most cogent reasons," citing *WOKO, Inc. v. Federal Communications Commission*, 80 U.S.App.D.C. 333, 341, 153 F.2d 623, 631, reversed on other grounds, 329 U.S. 223 (1946). Assuming that there has been a change of policy on the part of the Commission, we think it supplied convincing and fully adequate reasons for its action in the present case, as appears elsewhere in this opinion, and we cannot say that the decision results in unfair or discriminatory treatment of the appellant.

> "6. Whether the Commission's conclusion that a grant of Appellant's application would result in the demise of a television broadcast station is supported by adequate findings and by substantial evidence."

Appellant's principal contention in this regard is that the record does not show, and the Commission did not adequately find, that the antenna systems (if and when they

received improved service from appellant, under the proposed arrangement) would be "the decisive factor in the predicted demise of the [local] station."

Although matters of this sort are difficult of appraisal, we think the record amply supports the Commission's conclusion that the unconditional grant of appellant's application would probably result in the demise of KWRB-TV. Under existing conditions, that station since its inception in December 1957 has been operating in the "red," but in each succeeding year the gap between its income and operating expenses has decreased, with the real possibility that eventually it will operate in the black. The improving financial outlook is attributable to several factors: the better picture offered by KWRB-TV over that of the CATV system, in instances where the same network programs were carried both by KWRB-TV and one or more of the CATV cable channels; a decrease in the number of subscribers to the CATV cable in part of the area served by KWRB-TV; the fact that KWRB-TV is a family enterprise with low expenses[1] and high productivity; the substitution by KWRB-TV of network programming, for which charges are not made, in place of syndicated film purchases; and primarily its increasing sales of local spot advertising because of its widening network affiliations and the gain in viewers resulting from the decrease in the number of subscribers to the CATV cable.

If appellant's application were granted, the service which could be offered by the Western systems would be improved. Western could offer subscribers a larger choice of distant stations, and its picture would become better.[2] It is probable that new subscribers would be attracted and that many, if not most, of the subscribers would view only

[1] The owners apparently have not yet received salaries or other distributions from the station.

[2] This sentence was changed by the court's order amending its opinion. R. 225.

the stations on the CATV cable. The conclusion is certainly warranted on these facts that the local station would find it increasingly difficult to sell advertising, its best source of income, in the light of this potential shift in listener-viewer reception, and its survival would be seriously jeopardized.

The local station of course has already been licensed, and its overall programming has been found to serve the public interest. It has a good local operating record, and it programs for the community it serves. Its arrangements with the three networks with which it is affiliated permit it to carry their entire programs, but to delete the "commercials" and substitute "public service." It carries public service "spots" on behalf of its own community. The closing of the station would mean that no local programs of this type would be available to residents of at least half of the area served. Furthermore, other serious consequences would follow the closing of the local station. The record shows that it is too costly for the CATV cables to enter rural areas. Out of a total population of 75,960 persons (by the 1960 Advance Census Reports) in the area served by the local station, 43,600 lived in rural areas (including towns of less than 2,500 persons). Forty thousand of these persons would be without any television service at all if the local station went out of business.[8] Moreover, in the six urban areas where the CATV cables operated on a subscription basis, the 24,393 residents would be deprived of free television service if the local station failed, and thereafter would have television coverage available only if they subscribed and paid for it. We think that the Commission justifiably concluded that the continuance of the local station served the public interest, and that it was fully warranted in imposing conditions, designed

[8] In two towns of less than 2,500 persons each, having a combined population of 3,605, the CATV cables provided service to those who subscribed for it.

to protect that station, for the reconsideration of appellant's application.

The Commission's order will be

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1962

No. 17,089

CARTER MOUNTAIN TRANSMISSION CORPORATION, *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*.

JOSEPH P. ERNST and MILDRED V. ERNST,
d/b as Chief Washakie TV, *Intervenor*.

On appeal from a Decision and Order of the Federal Communications Commission.

Before: BAZELON, *Chief Judge*, and WILBUR K. MILLER and WASHINGTON, *Circuit Judges*.

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the decision and order of the Federal Communications Commission on appeal in this case is hereby affirmed.

PER CURIAM: WASHINGTON

Dated: May 23, 1963

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. First Amendment to Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. Communications Act of 1934, as Amended, 47 U.S.C. (1958 ed.)

§ 151. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

§ 201. (a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions

of such charges, and to establish and provide facilities and regulations for operating such through routes.

§ 214

(a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communications established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or

more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

* * * * * *

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such

authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity; or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

§ 307 (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

§ 308 (a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it . . . .

§ 309 (as effective at the date of the filing of petitioner's application)

(a) If upon examination of any application provided for in Section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. Such notice, which shall precede formal designation for a hearing, shall advise the applicant and all other known

parties in interest of all objections made to the application as well as the source and nature of such objections. Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a) of this section, it shall formally designate the application for hearing on the grounds or reasons then obtaining and shall notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. The parties in interest, if any, who are not notified by the Commission of its action with respect to a particular application may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) of this section, such grant shall remain subject to protest as hereinafter provided for a period of thirty days . . . In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) of this section, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and deter-

mination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

§ 326. Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

3. Interstate Commerce Act, 49 U.S.C. (1958 ed.)

§ 1.

(18) No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have

been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. . . .

* * * * *

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraphs (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this chapter, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term

is used in this chapter, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this chapter which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(22) The authority of the Commission conferred by paragraphs (18) to (21) of this section, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

APPENDIX C

Excerpts from Prior Commission Decision* Which Was Transmitted to, and Acquiesced in, by, Congress

72. With respect to issue No. 12 in the notice of inquiry, it has been urged by most of the broadcasters that the Commission is obligated in making the determinations of "public interest" under sections 307 (a) and 309 (a) of the Communications Act, to consider the impact upon a television broadcaster of the grant of radio facilities to a communication common carrier, where the common carrier facilities will be used for the purpose of providing communication service to a community antenna system operating in competition with the broadcaster. Implicit in this argument is recognition of the fact that it is not the common carrier which competes with the broadcaster or affects him adversely; it is the CATV. To embrace this argument would require the Commission to consider the content of the communications handled by the carrier, and the ultimate use to be made thereof.

73. In essence, the broadcasters' position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any nonbroadcast competitive enterprise. Thus, for example, we might logically be requested to invoke a prohibition against access to common carrier facilities by such enterprises as closed-circuit music and news services, closed-circuit theater television operators, and, possibly, even ordinary motion picture and legitimate stage operators; magazine and newspaper publishers, etc., comprising all of the entities which compete with broadcasting for the time and attention of potential viewers and listeners. The logical absurdity of such a position requires no elaboration.

74. We have heretofore partially answered this argument in our opinion *In re Application of Intermountain Micro-*

* *CATV and TV Repeater Services*, 26 F.C.C. 403, 431-433, 441 (1959), holding contrary to the instant case.

ware, 24 FCC 54, 16 R.R. 732 (January, 1958), which we now affirm. Enlarging upon that decision, we now wish to make this point: the "public interest" considerations which pertain to the grant of a communications common carrier application are not the same as, or interchangable with, those which pertain to the grant of either a Broadcast Service application or a Safety and Special Radio Services application. . . . In the case of a broadcast applicant, . . . despite the existence of broadcast frequency allocations and service rules, a more searching and complete "public interest" determination is made with respect to each individual applicant, including an examination of the "content" of the service proposal. Thus, a broadcast applicant must not only show that he is legally, technically, financially, and otherwise qualified, but he must also show, for example, explicitly how his proposed operations will serve the "public interest," including program plans and, under some circumstances, relationship to other media of mass communications and other matters. In the case of the common carrier applicant, in addition to the showing of legal, technical, financial, and other qualifications, there is, typically, the necessity for showing that there are no other public communication facilities available to do the specific job proposed; that the applicant is ready, able, and willing to serve all members of the public who may desire the service, without discrimination; and that there is now in being one or more members of the public who require the service, or some reasonable expectancy that one or more such persons will present themselves if the facility is authorized. There is no examination of the "content" of the intelligence which is to flow over the communication circuit.

75. We are of the opinion that, in relation to the authorization of a common carrier facility, whether it be for a radio facility under title III of the act or a wire facility under title II, it is neither proper, pertinent, nor necessary for us to consider the specific lawful use which the common

carrier subscriber may make of the facilities of the carrier. To take a different view would place the Commission in the anomalous position of acting as a censor over public communications, and put us under the burden of policing, not only the use of such facilities but the content of communications transmitted on the facilities. The logical extension of such a philosophy would require us to deny communications facilities of any kind (message telephone, telegraph, etc.) to CATV's and, for example, to deny access to facilities to those acting contrary to our concept of the public welfare. The adjudication of these matters is beyond our province.

76. Finally, we wish to emphasize that the rendition of common carrier communication service involves some situations which may be unique in the field of public utility regulation. The broadcasters challenge the propriety of regarding specialized microwave relay facility operations of the nature herein discussed, as being common carrier operations. It is not unusual, in the communications field, to find a carrier providing a regulated particular type of communication service over a particular route for a single customer. The carrier may be one who offers a specialized type of services, as distinguished from one who offers a general service. (*See In the Matter of Allocation of Frequencies, &c., for a Theatre Television Service*, 9 R.R. 1525, 1538-1539.) Also, it must be remembered that many communications common carriers traditionally and regularly provide services which are designated "private line services." Such services may, for instance, comprise single or multiple communications paths to one or many points for a single customer. In a context more closely related to the instant problem, we point to the fact that many broadcasters utilize the services of Bell System Co., or independent telephone companies, where the carriers provide a tailor made, especially constructed microwave facility comprising an off the-air pickup point, and associated relays terminating in the broadcaster's studio. This is a typical broad

caster's private line common carrier facility where there is, in fact, only one user or subscriber involved and where more than one such user on that particular facility is seldom, if ever, contemplated or expected. On the contrary, many common carrier installations affording similar pickup and relay services for CATV systems (as specialized carriers) provide such service to multiple subscribers simultaneously and operate with the continued hope and expectation that new and additional broadcast and CATV subscribers may avail themselves of the use of the facility. In the communications field, these activities have always been treated and regulated as a communications *common carrier* offering. We find no basis to warrant a change in this regard at this time.

77. For these reasons, we conclude that issue No. 12 in this proceeding must be answered by a determination that it would not constitute a legally valid exercise of regulatory jurisdiction over common carriers to deny authorization for common carrier microwave, wire, or cable transmission of television programs to CATV systems on the ground that such facilities would abet the creation of adverse competitive impact by the CATV on the construction or successful operation of local or nearby stations.

* * * * * *

99. . . . Two of the broadcasters' suggestions, both relating to CATV's, we adopt. These are that CATV systems should be required to obtain the consent of the stations whose signals they transmit and that they should be required to carry the signal of the local station (without degrading it) if the local station so requests. Since both of these steps require changes in the Communications Act, we will shortly recommend to Congress appropriate legislation, as indicated above. . . .

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No. 524

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

CARTER MOUNTAIN TRANSMISSION CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION

and

JOSEPH P. ERNST and MILDRED V. ERNST,
d/b as CHIEF WASHAKIE TV, *Respondents*

On petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR CHIEF WASHAKIE TV IN OPPOSITION

JAMES A. McKENNA, JR.

VERNON L. WILKINSON

McKENNA & WILKINSON
1735 DeSales St., N.W.
Washington, D. C. 20036

Counsel for

JOSEPH P. ERNST and
MILDRED V. ERNST, d/b/as
CHIEF WASHAKIE TV

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BRIEF FOR CHIEF WASHAKIE TV IN OPPOSITION

Opinions Below

The opinion of the court below (Pet. App. 1-12) is reported at 321 F. 2d 359. The decision of the Federal Communications Commission there affirmed is reported at 32 FCC 459 (1962).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 23, 1963 (Pet. App. 12). A petition for

rehearing en banc was denied by the nine judges of the court below in a unanimous order entered July 9, 1963. The petition for a writ of certiorari was filed October 7, 1963. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

Question Presented

Whether the Federal Communications Commission, in acting on an application by a common carrier for radio microwave frequencies by which to pick up and transmit the signals of out-of-state television broadcast stations to the common carrier's sole proposed customer, an associated company operating CATV systems in the only six towns in northwestern Wyoming which have a population in excess of 1,000 persons, may consider the adverse impact which the additional and improved signals thus supplied CATV subscribers in three of those six towns (Riverton, Lander and Thermopolis, Wyo.) would have on the ability of northwestern Wyoming's only television broadcast station (KWRB-TV) to continue to provide some 22,500 persons in that area with an only television service and some 45,000 persons with a program service tailored to their particular needs.

Statutes and Rules Involved

Section 307(a) of the Communications Act of 1934, as amended, (47 U.S.C. Sec. 307(a)), provides:

> The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

FCC Rule 21.700 (1 Pike & Fischer, *Radio Regulation*, 71:700), governing the issuance of point-to-point radio microwave frequencies for common carrier use reads as follows:

§ 21.700. *Eligibility.*—Authorizations for stations in this service will be issued to existing and proposed communication common carriers. Applications will be granted only in cases where it is shown that (a) the applicant is legally, financially, technically and otherwise qualified to render the proposed service, (b) there are frequencies available to enable the applicant to render a satisfactory service, and (c) the public interest, convenience or necessity would be served by a grant thereof.

Statement

In order that the questions posed by the petitioner (Pet. 2-3) may be considered in a factual setting and not in the abstract, the following background facts are deemed pertinent to the instant petition to review the judgment of the court below, affirming the Commission's refusal, unless certain conditions were first met, to grant petitioner's application for radio microwave frequencies by which to serve an associated company operating CATV systems in Riverton, Lander, and Thermopolis, Wyoming:[1]

Pursuant to Congressional mandates requiring the Commission "to make available, so far as possible, to *all* the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service" (47 U.S.C. Sec. 151),[2] equitably apportioned "among the several States and communities" (47 U.S.C. Sec. 307(b)), the Commission in 1952, after voluminous rule-making proceedings extending over a four-year period, promul-

[1] The instant record shows that Bliss and Mitchell, who are the principal officers and stockholders (96.7%) of the company (Western Television Corporation) which operates CATV systems in the only six towns in northwestern Wyoming with a population in excess of 1,000 persons, are also president and vice president, and own 50% of the stock of Carter Mountain Transmission Corporation (32 FCC 472, Fdgs. 6 and 7).

[2] Emphasis supplied throughout this brief.

gated a nation-wide television allocation table (Rule 3.606; 1 Pike & Fischer, *Radio Regulation* 53: 606). *Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954). In there allocating given channels to specific states and communities for off-the-air television broadcast use, two priorities were uppermost in the Commission's deliberations: First, of providing to the extent possible at least one off-the-air television signal (coverage facilities) to all the people of the United States, rural as well as urban, and secondly, of providing at least one local outlet (origination facilities) to as many communities as possible (see 1 Pike & Fischer, *Radio Regulation* (Pt. III), p. 91:620, para. 63).

Using those criteria the Commission in 1952 assigned ten VHF channels to seven different towns (since increased to eight) in the state of Wyoming—including Channel 10 to Riverton, Wyoming (Rule 3.606). Because of that state's sparse and scattered population,[1] only three of the ten VHF channels thus allocated to Wyoming have been activated to date (32 FCC 466, 472): Station KFBC-TV on Channel 5 in the southeastern corner of the state (Cheyenne); Station KTWO-TV on Channel 2 in east Central Wyoming (Casper); and Station KWRB-TV on Channel 10 in northwestern Wyoming (Riverton). The last-mentioned station, licensed to respondent Joseph P. Ernst and Mildred N. Ernst d b as Chief Washakie TV, with its main studio in Thermopolis, identifies itself on the air, pursuant to prior Commission consent, as a Riverton-Lander-Thermopolis-Worland station (Tr. 134, J.A. 11).

In April 1958, approximately four months after Station KWRB-TV went on the air, apparently of the view that the local television station would slow down the expansion of their CATV operations in northwestern Wyoming unless the quality of the pictures provided on the cable was

[1] Although Wyoming has an area twelve times that of Massachusetts, its entire population in 1960 (330,066 persons) was less than that of the city of Portland, Oregon.

improved (cf. 32 FCC 475; Fdg. 16), the cable operators assisted in the organization of Carter Mountain Transmission Corporation, which applied for microwave radio frequencies by which to pick up television signals atop Copper Mountain and to deliver such signals to CATV systems in three of the four towns with which KWRB-TV is identified (Riverton, Lander, and Thermopolis) (R. 1-23).

At or about the time that petitioner filed the aforementioned microwave application, the attention of Congress and the Commission was being forcefully directed to developments which indicated that the "piping in" (with and without microwave facilities) of television signals from distant metropolitan markets for use by CATV systems was in some instances precluding the establishment of a live television service in small communities which would otherwise support stations of their own, and was in other instances jeopardizing the continuation of existing stations in a number of small markets,—meaning that such communities were not being provided a local outlet of their own and that persons *in rural areas not accessible to a CATV system* were being deprived of a television service of any kind, thus thwarting the 1952 TV allocation table and the basic priorities there enunciated (cf. *CATV and TV Repeater Services*, 26 FCC 403).

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[1] All "R.—" references in this brief are to the record as certified by the Commission to the court below.

[2] The Commission was quite aware that television homes on cable systems which (like those in Riverton, Lander, and Thermopolis) do not carry the local station are to all intents and purposes lost to that station: First, because cable subscribers rarely purchase "rabbit ears" and almost never incur the expense of installing a rooftop antenna; second, because built-in antennas are frequently disconnected when a television set is attached to a cable system; and third, because most sets connected to a cable system are not equipped for a switchover to a live pick-up, except by going to the trouble of disconnecting the set from the cable for a particular program.

Action on petitioner's application was accordingly held in abeyance while the Commission conducted an overall inquiry into the impact of CATV systems, translators, satellites and repeaters on the orderly development of television broadcasting (FCC Docket No. 12443). As a result of that proceeding, in a Report and Order adopted April 13, 1959 (*CATV and TV Repeater Services*, 26 FCC 403), though recognizing the likelihood or possibility of adverse impact of CATV operations on regular television stations, the Commission was unable to conclude from the data *there adduced* "at what point, in terms of size of the market or auxiliary, the number of signals brought in, etc., this impact becomes serious enough to threaten the station's continued existence or serious degradation of the extent and quality of its service" (*CATV and TV Repeater Services*, 26 FCC 403, 421-422, para. 45; cf. paras. 5, 26, 51, 54, 70, 82, 85).[1]

Although concluding in general that it lacked jurisdiction, in the absence of additional legislation, to regulate CATV systems in those instances where radio frequencies were *not* being utilized in connection with such operations, it elsewhere recognized in its Report and Order, both under its own decisions and those of the courts, that "economic injury, amounting to public detriment", must be considered, particularly in "307(b) situations" (*CATV and TV Repeater Services*, 26 FCC 403, 435, para. 82); that "clearly, in the present series of situations [where CATV and other auxiliary services are seeking radio frequencies in areas served by regular TV stations] there are '307(b)' considerations involved" (*CATV and TV Repeater Services*, 26 FCC 403, 435, para. 83); and

[1] The herein referenced paragraphs from the Commission's Report and Order in FCC Docket 12443, (*CATV and TV Repeater Services*, 26 FCC 403) should be considered by the Court in connection with the particular paragraphs which petitioner has excerpted therefrom (Pet. App. 21-24), and as qualifying the broad interpretation which the petitioner places on that Report (Pet. 18-19).

that in those situations where the number of persons "losing their only service is considerably greater than the number who would receive the multiple service", the public interest would be affected and findings thereon would be required (*CATV and TV Repeater Services*, 26 FCC 403, 438, para. 90, cf. para. 82).

In a timely filed pleading objecting to a grant of petitioner's microwave application, KWRB-TV requested an opportunity by an evidentiary hearing to show, in line with the Report and Order in FCC Docket No. 12443, (1) that sparsely populated northwestern Wyoming which KWRB-TV serves is an area where the impact of improved CATV operations (via additional microwave facilities) would destroy, jeopardize, or diminish the service of a live television broadcast station, and (2) that the number of persons in northwestern Wyoming who would thus lose their sole television service was considerably greater than the number who would thereby gain a multiple service via the microwave equipped CATV systems (R. 38-61).

In a subsequently ordered hearing, the following facts were established by evidence which for the most part was wholly uncontradicted (R. 405-433; 32 FCC 468-482; Fdgs. 1-34):

> That the U.S. Census lists only 15 "towns" or other "incorporated places" (with a combined 1960 population of 27,323 persons) in those portions of the seven counties in northwestern Wyoming embraced within KWRB-TV's Grade B contour (Fdg. 14); that the entire area (13,845 square miles) lying within such contour had a 1950 population of only 36,918 persons and a 1960 population of approximately 45,000 persons—representing an average population density of less than one family per square mile (Fdgs. 10-12); and that there are only four towns in

[1] At the time the parties exchanged their exhibits in the instant hearing (November, 1960), minor civil division 1960 census population figures for Wyoming had not yet been released by the Census Bureau. The 45,000 approximation figure for 1960 was

KWRB-TV's Grade A contour (Lander, Thermopolis, Riverton and Worland) and only two towns between KWRB-TV's Grade A and B contours (Basin and Greybull) which have populations in excess of 1,000 persons (Fdg. 15);

That Western Television Corporation operates a CATV system in each of the aforesaid six towns but not in the nine smaller towns and incorporated places within KWRB-TV's service area (Fdg. 16); that some 2535 families (approximately 8870 persons) are presently served by Western's cable systems in those six towns (Fdg. 16); that Western's own estimate of the potential number of subscribers to its cable systems in those six towns is 5635 families (approximately 19,720 persons) (Fdg. 16); that the programs of three stations (KOOK-TV, Billings, Montana; KTWO-TV, Casper, Wyoming, and KID-TV, Idaho Falls, Idaho) are carried on the cable systems in all six towns, with those of a fourth station (KGHL-TV, Billings) also available on the cable in Thermopolis, Worland, Basin and Greybull, whereas KWRB-TV's programs are not carried on the cable systems in any of those towns (Fdg. 17); that because of distant pickup points and line losses (without microwave facilities), the quality of the pictures on the cable systems in Riverton, Lander and Thermopolis is not "good" (Fdg. 19; KWRB-TV Exs. 5, 5A, 6; Tr. 151-158, 248);

That because of the common network affiliation of KID-TV and KOOK-TV and the common source of their non-locally originated programming,[1] with

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arrived at by assuming that KWRB-TV's Grade B contour continued to encompass the same *proportion* of a given county's *population* in 1960 as it did in 1950 (e.g., 43.7% of the *population* of Big Horn County, 92.3% of the *population* of Fremont County, etc.) See Fdgs. 12-13.

[1] KID-TV picks up its programs from ABC and CBS stations in Salt Lake City and KOOK-TV in turn picks up the signal of KID-TV (Tr. 135).

KTWO-TV and KWRB-TV affiliated with all three networks, the same network programs broadcast by KWRB-TV frequently appear simultaneously on as many as three channels on the cable system (Fdgs. 18-19); that national and local spots sandwiched in by KWRB-TV between popular network shows, with KWRB-TV not carried on the cable, are thus not seen by persons viewing those programs on the cable systems (Fdg. 19); that this "splitting" of the audience in KWRB-TV's service area has made it extremely difficult for KWRB-TV to sell national and local "spots" (Tr. 142, 165, 182-184, 232, 235, 243-244, 337; cf. Fdg. 33); that 66.6% of KWRB-TV's revenues are derived from local advertisers, with 57% of its total revenue derived from Riverton, Lander and Thermopolis, the very towns to which the microwave facilities here sought are designed to bring additional and improved signals (Fdg. 33); that the amount of revenue obtained from each of the four principal towns within KWRB-TV's service area is in inverse proportion to the number of subscribers who are on the cable system in each of those towns (Fdgs. 16, 33);[2] that if the local revenues

[2] The striking correlation between revenues and number of CATV subscribers in the four towns having a population in excess of 1,000 persons within KWRB-TV's Grade A contour is apparent from the following chart (see 32 FCC 468, 473-475, 481, Fdgs. 13, 14-16, 33):

Town	1960 Population	1960 Homes	CATV Homes	% of Homes on Cable	(1959) Local Revenue	(1959) Per Capita
Lander	4182	1,195	—	0%	$14,199.31	$3.39
Riverton	6845	1,956	250	12%	17,429.14	2.54
Thermopolis	3955	1,130	500	44%	6,457.20	1.63
Worland	5806	1,659	1225	74%	2,485.45	0.43
Total	20,788	5,940	1975	33%	$48,563.10	$1.95

It will thus be noted that although Lander is appreciably smaller than Worland, the local revenues which KWRB-TV derived from Lander in 1959 were about six times those received from Worland. Similarly, those derived from Thermopolis, a town only 2/3 as large as Worland, were approximately 2½ times greater than those

derived from Lander and Riverton dropped, as a result of additional and improved signals on the cable obtainable via microwave, to the smaller amounts presently received in Thermopolis and Worland where 44% and 74% of the homes are on the cable, the present gap between cash income and outgo could no longer be bridged by the Ernsts' foregoing salaries, nor by income from nor by the sale of their AM properties (cf. Fdgs. 32-33; cf. 32 FCC 485, Concl. 12);

That (because of the high cost of coaxial lines and attendant repeaters) CATV systems are unable to serve persons on the outskirts of the towns in which they operate, not to mention those residing in rural areas (see Fdg. 28); that one-watt VHF boosters are similarly restricted for the most part to persons residing in the towns to which they are licensed (see Fdg. 28; KWRB-TV Ex. 6, Tr. 158, 164, 165); that KWRB-TV is providing a highly commendable program service tailored to the needs of the area it serves (local news, local entertainment features such as local rodeos and state fairs; local educational roundtable discussion, local farm agents, local agricultural reports, local weather reports, local high school and University of Wyoming football games, and local political broadcasts) (Fdgs. 22-28); and

That if KWRB-TV ceased to operate, approximately 50% of the 45,000 persons now served by KWRB-

from Worland. Conversely stated, in Worland, where 74% of the homes (i.e., some 90% of the TV homes) were on the cable, the local revenues were insignificant, because local merchants and other local advertisers in Worland were quite aware in 1959 that their advertising messages, when sandwiched in between popular network shows carried by KWRB-TV, would not be seen by their neighbors who were viewing that same network show on the cable from KID-TV, KOOK-TV, KDHL-TV, or KTWO-TV. On the other hand, in Lander where the cable viewing in 1959 was nil, merchants and other advertisers in that community knew that the popular network shows were being viewed on KWRB-TV and that their local advertising messages thus would receive full exposure.

> TV[1] would be without a television service of any kind, and the entire 45,000 persons within KWRB-TV's service area (except for 187 persons in Natrona County) would be without any local origination facilities and without any programs geared to their local needs (cf. Fdgs. 28-29).

On the basis of the foregoing findings, the Commission (with one member dissenting) concluded that a grant to petitioner of the microwave frequencies here sought would jeopardize KWRB-TV's ability to remain on the air, and that the need for a local television outlet and the service it provides to otherwise underserved areas of northwestern Wyoming outweighed the need of cable subscribers (a maximum potential of 5,635 homes) in Lander, Thermopolis, and Riverton for additional and improved multiple television signals (R. 625-635; 32 FCC 459-467). The microwave application was accordingly denied "without prejudice to refiling when a showing can be made that the duplication of programming is adequately avoided and a satisfactory arrangement is arrived at by which the cable system will carry the local KWRB-TV service" (R. 631; 32 FCC 465).

On appeal therefrom the court below affirmed (Pet. App. 1-12) and thereafter denied en banc review.

Argument

For ease of treatment and in the interest of clarity, petitioner's two arguments for the issuance of a writ of certiorari (Pet. 8-20) are considered in reverse order.

1. Petitioner contends in effect (Pet. 14-20) that the Commission, in making radio microwave grants to a common carrier, is powerless to consider the impact thereof on its nationwide television allocation table (Rule 3.606) adopted in implementation of the basic policies embodied

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[1] See fn. 1, p. 7, *supra*.

in 47 U.S.C. Secs. 151 and 307(b). In that table the Commission found that ten assignments were needed to constitute a "fair, efficient, and equitable" distribution of television service to the State of Wyoming (Rule 3.606). With only three of those assignments thus far activated, Wyoming does not even now have it aliquot share of live television service (see 32 FCC 472, Fdg. 9). Notwithstanding the Commission's finding, concurred in by the court below, that the common carrier microwave grant here sought would reduce from three to two the number of operating stations in Wyoming (32 FCC 464, para. 16), leaving the northern and western half of the state without a television broadcast station of its own, such fact is irrelevant, so the petitioner would have us believe, when the Commission is making radio grants in the common carrier field.

Although recognizing (Pet. 14-15) that Congress in 1934 combined in a single agency the responsibility of regulating all interstate communications by wire and radio, common carrier as well as broadcasting, petitioner nevertheless argues that the Commission must not let its left hand knoweth what its right hand doeth. In the absence of explicit legislation to that effect, no such intention is to be ascribed to Congress. As this Court has noted in an analogous situation, involving rail and motor transportation, "principles previously established for application within a single form of transportation cannot always be transplanted to control its relations with another or those of both with the public generally, without consequences unduly harmful to one or to the public interest". *Eastern Central Ass'n* v. *United States*, 321 U.S. 194, 207.

Here, when it placed in one agency all radio communications, both common carrier and broadcasting, Congress prescribed a single test for all radio grants, whether for common carrier or broadcasting use, namely, "if public convenience, interest or necessity will be served thereby"

(47 U.S.C. Sec. 307(a)). That same test was explicitly repeated by the Commission in its rules governing radio grants to common carriers for point-to-point microwave use (Rule 21.700).

"[W]hat is in the public interest is, as the Supreme Court has said many times, within wide limits for the Commission to determine." *Harbenito Broadcasting Co. v. Federal Communications Commission*, 94 U.S. App. D.C. 329, 334, 218 F. 2d 28 (1954). The Commission is free to consider not only the mandates and policies which Congress has laid down in the Communications Act but congressionally declared policies embodied in other legislation (monopoly, diversification, etc.). *Mansfield Journal Co. v. Federal Communications Commission*, 86 U.S. App. D.C. 102, 106-107, 180 F. 2d 28 (1950).

As succinctly stated in *Carroll Broadcasting Co. v. Federal Communications Commission*, 103 U.S. App. D.C. 346, 349, 258 F. 2d 440 (1958):

> The basic charter of the Commission is, of course, to act in the public interest. It grants or denies licenses as the public interest, convenience and necessity dictate. *Whatever factual elements make up that criterion in any given problem*—and the problem may differ factually from case to case—*must be considered*. Such is not only the *power* but the *duty* of the Commission.
>
> So in the present case the Commission had the power to determine whether the economic effect of a second [radio] license in this area would be to damage or destroy service *to an extent* inconsistent with the *public interest* . . . .

That the Federal Communications Commission, functioning under a statute as broad as the Federal Communications Act, may consider the impact (i.e., the end-use consequences) of a radio microwave grant on broadcasting operations in sparsely populated northwestern Wyom-

ing follows *a fortiori* from this Court's decision construing the much narrower provisions of the Federal Power Act. *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1.

The breadth which petitioner would ascribe (Pet. 17) to the result reached by the Commission and by the court below in the instant case is misplaced. The instant decision turned on a special factual situation shown by the evidence of record to exist in northwestern Wyoming. Attempts by stations in other areas to make a like showing have been unsuccessful to date.

2/ Petitioner's First Amendment contentions (Pet. 8-13) are foreclosed by this Court's decision in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-227. It follows *a fortiori* from that decision that the denial by the Commission of an application by a common carrier for microwave frequencies because of the economic impact which such a grant would have on its television broadcast allocation table, resulting in an over-all loss of service to the public, is not a denial of free speech. See *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 103 U.S. App. D.C. 346, 258 F. 2d 440 (1958).

Conclusion

The decision below is correct, no important issue calling for further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES A. MCKENNA, JR.

VERNON E. WILKINSON
MCKENNA & WILKINSON

1735 DeSales St., N.W.
Washington, D. C. 20036

Counsel for

JOSEPH P. ERNST and
MILDRED V. ERNST, d/b/a
CHIEF WASHBAUM TV

October 30, 1963

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 524

CARTER MOUNTAIN TRANSMISSION CORP., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A12) is reported at 321 F.2d 359. The decision of the Federal Communications Commission (J. App. 150-163)[1] is reported at 32 F.C.C. 459.

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[1] "J. App." refers to the printed joint appendix filed in the court of appeals. Occasional references designated "R" are to the pages of the original record of the proceedings before the Commission.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on May 23, 1963 (Pet. A12). Rehearing *en banc* was denied on July 9, 1963. The petition for a writ of certiorari was filed on October 7, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Federal Communications Commission denied a license for common carrier microwave radio facilities where the sole purpose of such facilities was to carry television signals to a community antenna television system, and where the probable result of a grant would have been the demise of the only television station in the area and the loss of its service to the public. The questions presented are:

1. Whether injury to the public in the form of a loss of local television broadcast service resulting from the competitive impact of a grant of radio facilities to a common carrier can properly be considered by the Commission in determining whether it is in the public interest to grant the common carrier application.

2. Whether the Commission's action constitutes an abridgement of free speech in violation of the First Amendment to the Constitution and Section 326 of the Communications Act of 1934.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution and of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*, are set forth in the appendix to the petition (Pet. App. A13-A18).

STATEMENT

Petitioner Carter Mountain Transmission Corporation is a common carrier by radio licensed by the Federal Communications Commission (J. A. 150). Prior to 1958 Carter Mountain held an authorization from the Commission for microwave radio facilities on Copper Mountain, Wyoming, which it used to transmit television signals, picked up off-the-air on Copper Mountain, to community antenna television systems (CATVs) operated by Western Television Corporation in the towns of Riverton and Lander, Wyoming (J. A. 150-151, R. 8).[2] Western, then the sole customer of Carter Mountain, delivered the television signals to its subscribers by means of a system of wire cables (J. A. 127, 133-136). Because of the prohibitive cost of extending the cables to rural areas, Western's CATV service was available only to subscribers living in the towns (J. A. 159).

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[2] A community antenna television system consists of a receiving antenna and wire lines, together with the necessary amplifying equipment, through which the television signals received are transmitted to the television sets of subscribers. See *In the Matter of Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" on the Orderly Development of Television Broadcasting*, 26 F.C.C. 403, 407-408.

On April 24, 1958, Carter Mountain filed an application with the Commission for a construction permit to install an additional transmitter on Copper Mountain, to enable it to add a second channel to Western's CATV systems in Riverton and Lander, and to add a new two-channel service to a CATV operated by Western in Thermopolis, Wyoming (J. A. 150-151, R. 3-11, 405). Carter Mountain's application was granted without hearing in April 1959 (R. 405).

The licensee of television station KWRB-TV in Thermopolis, Wyoming (KWRB), filed a protest against the grant pursuant to former Section 309(c) of the Communications Act, 47 U.S.C. (1958 ed.) 309(c). KWRB, the only television station in sparsely settled northwest Wyoming, serves the towns of Thermopolis, Riverton and Lander, and provides the only television service available in the surrounding rural areas (J. A. 158, 128-133). The protest alleged that the grant of improved facilities to Carter Mountain would strengthen the competitive position of Western's CATVs to the extent that KWRB would be forced to discontinue service to the public (R. 40-51).

The Commission stayed the effectiveness of the grant to Carter Mountain (R. 97-102) and designated the matter for hearing on the following issues *inter alia* (R. 174-175):

> To determine the areas and populations now served by Station KWRB-TV, Thermopolis, Wyoming, and the nature and type of service provided by said station.

To determine what impact a grant of the aforesaid application will have upon the operation of Station KWRB-TV, Thermopolis, Wyoming, and the resulting injury, if any, to the public now served thereby.

To determine, in light of evidence adduced and determinations made, whether a grant of the aforesaid application will serve the public interest, convenience, or necessity.

After a hearing, the examiner issued an initial decision proposing to deny the protest and affirm the grant to Carter Mountain (J.A. 127-149, R. 405-433). He ruled that whatever impact the grant might have upon the local television station was of no legal significance (J.A. 146-149).

Upon the filing of exceptions to the initial decision, the Commission denied Carter Mountain's application, holding that authorization of the new facilities would not serve the public interest (J.A. 150-163). The Commission found that the improvement in Western's CATV service and competitive position vis-à-vis station KWRB resulting from a grant of additional facilities to Carter Mountain would probably cause the demise of the local station and the loss of its service to the public (J.A. 153-158). In that event, local programs would be available to persons within its service area, persons living in rural areas not served by the CATV cables would have no television service, and persons living in the towns would be deprived of free television service and would have CATV service only if they subscribed and paid for it (J.A. 156, 159). The Commission concluded that the

need for the local station and its service to rural areas outweighed the need for the improved CATV service (J.A. 159).

The Commission's order granted Carter Mountain leave to refile its application when it could show that the CATVs would carry the signal of KWRB and not duplicate the latter's network programming (J.A. 160).[3]

The court of appeals affirmed (Pet. A1-A12). Rejecting petitioner's contention that the Commission was limited to such classic common carrier criteria as demand for service, efficiency, etc., the court upheld the Commission's authority under the Communications Act to consider the effect of a proposed common carrier use of radio upon other uses of radio licensed by the Commission (Pet. A3-A6). The court stated (Pet. A6) that the Commission may properly consider the "end use" of common carrier facilities by a CATV in determining the public interest, citing *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1. The court of appeals also rejected petitioner's contentions that the Commission's action unlawfully denied Western access to its proposed facilities and infringed Western's First Amendment rights. Pointing out that Western's right of access was dependent upon whether petitioner first obtained a license from the Commission (Pet. A6), the court ruled that under the Communications Act "a denial of a station license, validly made because

[3] By a Memorandum Opinion and Order issued on May 24, 1962, the Commission denied reconsideration (R. 733-736).

the standard of 'public interest, convenience, or necessity' has not been met, is not a denial of free speech. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-27" (Pet. A7-A9).

ARGUMENT

1. The primary question in this case is whether the Communications Act authorizes the Commission, in ruling upon an application for a common carrier radio license, to consider the competitive impact which the proposed carrier service would have upon the public's enjoyment of existing broadcast facilities. It seems clear that the Commission, charged by the Act with regulation of common carrier and broadcast services in the public interest, properly held that it may weigh the impact of a grant in one service upon existing facilities in another. Petitioner's argument to the contrary (Pet. 14-20) would negate the purpose of the Communications Act to achieve a comprehensive and coordinated regulation of all interstate communication by wire and radio through the Commission and to insure the "maximum benefits of radio to all the people of the United States." Sections 1, 307 (b) of the Communications Act, 47 U.S.C. 151, 307 (b); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 210-217; *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 279, 285.

A common carrier cannot construct a new facility or extend its existing facilities *sua sponte* or upon customer demand. The Communications Act gives the Commission jurisdiction of "every common car-

rier engaged in interstate or foreign communication by wire or radio," 47 U.S.C. 201, and this jurisdiction goes to the extension and acquisition of new radio or wire lines, which can only be constructed where required by the "public convenience and necessity," 47 U.S.C. 214. Furthermore, the Act requires a license for all uses of radio, including its use for common carrier purposes, which can be obtained only upon a showing that the "public interest, convenience, and necessity" will be served 47 U.S.C. 301, 307-310. It is settled that, in passing upon an application for a new broadcast authorization, the Commission may properly consider a resulting loss of existing broadcast service as a factor bearing upon the public interest. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475-476; *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 258 F. 2d 440, 443-444 (C.A. D.C.). Similarly, in the common carrier field, the competitive impact of a proposed facility upon existing common carrier service has been held to be a "relevant factor in weighing the public interest." *Federal Communications Commission* v. *R.C.A. Communications, Inc.*, 346 U.S. 86, 94.

Under the circumstances, it was clearly proper for the Commission to consider the effect of the proposed common carrier operation upon the existing broadcast service of KWRB. The relation of the two services is immediate and direct. Petitioner proposed to pick up off the air signals broadcast by television stations in other areas, transmit them by microwave to CATV systems in the area served by KWRB, and

thus to deliver in practical effect competing television material. As the court of appeals properly recognized (Pet. App. A4) the "Commission is charged with the duty of regulating not only common carriers by radio but broadcasters of television programs. It cannot let its decisions in the radio carrier field interfere with its responsibilities in the television broadcasting field."[4]

2. The fact that the Communications Act provides no specific grant of authority over community antenna systems does not preclude the Commission action here involved. Petitioner's argument (Pet. 18-19) that the Commission exceeded its authority when it considered the use to be made of the proposed common carrier service cannot be distinguished in substance from the position unsuccessfully urged by the carrier in *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1. In *Transcontinental* this Court sustained the authority of the Federal Power Commission to deny a certificate for the transportation of natural gas where the proposed end use—burning the gas under the purchaser's industrial boilers—was deemed inferior to other possible

[4] Petitioner's proposed use of radio would be destructive of the Commission's pattern of allocation of television stations to the various communities of the United States. See *Logansport Broadcasting Corp.* v. *United States*, 210 F. 2d 24 (C.A. D.C.). If the Commission were required to grant licenses for common carrier uses of radio without regard to the impact on the television allocation plan, it could not carry out the statutory mandate of Section 307(b), 47 U.S.C. 307(b), to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

uses, although the Power Commission had no jurisdiction over direct sales for use by the purchaser. The authority of the Communications Commission to consider the proposed "end use" here would thus appear to be clearly established since, unlike the Natural Gas Act of 1938 (see 365 U.S. at 8, 19), the Communications Act is intended to provide a comprehensive scheme of federal regulation of interstate communications. See Section 1, 47 U.S.C. 151. Community antenna television systems present an "end use" peculiarly related to television broadcasting. *Clarksburg Publishing Co. v. Federal Communications Commission*, 225 F. 2d 511, 517 (C.A. D.C.).

The fact that the Commission in 1959, as part of its general inquiry into *CATV and TV Repeater Services*, 26 FCC 403, 431-433, concluded that it lacked the authority exercised here should pose no problem. This general inquiry was concluded prior to the Court's decision in *Transcontinental Gas*. Further, there is here no long-standing and consistent disclaimer of authority by the agency entrusted with the administration of the statute. Nor has there been any legislative enactment or reenactment which could be said to reflect Congressional acquiescence. While several bills have been introduced in Congress to give the Commission direct authority over CATVs,[*] a question not involved here, there is no warrant in this legislative history for a finding that the Commission's present view of the statute is erroneous.

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[*] See, *e.g.*, S. 1739, S. 1741, S. 1801, S. 1886, S. 2303 and S. 2653, 86th Cong., 1st Sess.

3. The court of appeals properly rejected petitioner's contention (Pet. 8-13) that its customer, Western, had a legal right under the Communications Act and the First Amendment to demand and receive the service for which petitioner sought a license (Pet. A8, A5-A6). First of all, as the court of appeals noted (Pet. A8), Western was not before it. In any event, however, contrary to petitioner's argument, the fact that a member of the public has a right to non-discriminatory service from an existing common carrier does not establish that where existing carriers do not offer a desired service the Commission must grant a license to a carrier proposing to provide that service.[*]

It has long been settled by this Court's decision in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-227, that the constitutional "right of free speech does not include * * * the right to use the facilities of radio without a license" and that a denial of license, upon a valid determination that the public interest standard has not been met, is not a denial of free speech. Petitioner's attempt (Pet. 11-12) to distinguish the *National Broadcasting Com-*

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[*] Contrary to petitioner's repeated suggestion (Pet. 9, 13, 16-17), this case does not present any question as to the propriety of a denial of license to a common carrier serving the public in general because its many customers may include competitors of broadcast stations, or as to the validity of a grant conditioned upon a discriminatory denial of service otherwise available to the public. Since the facilities here were for the sole use of Western's CATVs, the court of appeals had no occasion to consider factually different situations.

pany case on the ground that the public has a legal right to demand access to a common carrier service, but no right of access to a broadcasting station, rests on its basic and unsupported premise that the demand of one potential customer, and not the public interest, is the sole governing consideration before the Commission when it passes on the application of a common carrier to use radio. As we have shown above, the effect of a proposed common carrier service upon an existing broadcast service is a proper matter for consideration by the Commission. Its consideration here did not constitute a denial of any right of free speech.[8]

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[8] Petitioner's contention (Pet. 10-11) that the Commission's statement of the conditions prerequisite to any grant of the proposed service constituted an attempt to censor the intelligence to be transmitted over its facilities is not well taken. The conditions were reasonably designed to avoid the threatened damage to the local station and the public interest, and hence do "not amount to 'censorship' within the meaning of Section 326" of the Communications Act, 47 U.S.C. 326 (Pet. A8-A9). See *Bay State Beacon* v. *Federal Communications Commission*, 171 F. 2d 826 (C.A.D.C.); *KFKB Broadcasting Ass'n* v. *Federal Radio Commission*, 47 F. 2d 670 (C.A.D.C.). While the conditions would require the CATVs to carry the programs of KWRB and not to duplicate those programs on competing channels, they would not deny any programs to the viewing public.

CONCLUSION

The petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

LIONEL KESTENBAUM,
Attorney.

MAX D. PAGLIN,
General Counsel.

DANIEL R. OHLBAUM,
Associate General Counsel.

RUTH V. REEL,
Counsel.

Federal Communications Commission.

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